IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1008

DONALD YOFFE,

Petitioner,

versus

KELLER INDUSTRIES, INC., a corporation and HENRY A. KELLER and NORMAN S. EDELCUP, Individuals,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner Donald Yoffe respectfully prays that a writ of certiorari issue to review the judgment, opinion and opinion on rehearing of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on September 13, 1978 and October 27, 1978.

OPINION BELOW

The opinion and opinion on rehearing of the Court of Appeals, reported at 580 F.2d 126 and 582 F.2d 982, appear in the appendix to this brief. No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 13, 1978. A timely petition for rehearing was denied with opinion on October 27, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a district court can award attorney's fees in excess of those authorized by 28 U.S.C. §1923 when a plaintiff moves for a voluntary dismissal under F.R.Civ.P. 41(a)(2)?

2. Whether a plaintiff has a right to appeal a final judgment awarding defense counsel $44,523.20 in fees after plaintiff moved for a voluntary dismissal under F.R.Civ.P. 41(a)(2).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1291. Final decisions of district courts.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

§1920. Taxation of costs.

> A judge or clerk of any court of the United States may tax as costs the following:
>
> * * *
>
> (5) Docket fees under Section 1923 of this title.

§1923. Docket fees and costs of briefs.

> Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> * * *
>
> $5.00 on discontinuance of a civil action.

§2072. Rules of civil procedure for district courts.

> The Supreme Court shall have the power to prescribe, by general rules, the forms

of process, writs, pleadings and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive rights . . .

* * *

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect . . .

F.R.Civ.P. 41(a)(2). Voluntary Dismissal By Order of Court.

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

F.R.App.P. 3(a). Filing the notice of appeal.

An appeal by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing

of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.

STATEMENT OF THE CASE

In May of 1974, Donald Yoffe filed suit against Keller Industries, Inc., Henry A. Keller and Norman S. Edelcup in the Southern District of Florida. Jurisdiction was based on diversity of citizenship. All of the facts necessary to determine the case are contained in the opinion and opinion on rehearing of the Court of Appeals. On December 17, 1974, Yoffe filed a motion for voluntary dismissal without prejudice. The judge heard defendants' argument in opposition and, by order of January 28, granted Yoffe's motion. The January 28 order required Yoffe to pay "all costs and expenses, including reasonable attorney's fees incurred by defendants in this case." Yoffe appealed the January 28 order. The Fifth Circuit dismissed the appeal, presumably on the basis that an appeal prior to an order setting the amount of fees was premature.

A hearing was held to determine the amount of fees and costs. The district judge allowed attorney's fees to three law firms in the total amount of $44,523.20. Yoffe appealed again, challenging the imposition of attorney's fees and the amount set. The Fifth Circuit dismissed the appeal on the ground that Yoffe had not suf-

fered "legal prejudice." It rejected Yoffe's contention that the district judge had no authority to award attorney's fees in excess of the amount allowed by 28 U.S.C. §1923.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Decision in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 420 (1975).

The Fifth Circuit rejected Yoffe's argument that the district judge's award of attorney's fees should have been limited to those fees expressly authorized by 28 U.S.C. §1923.

> The line of authority represented by these cases easily disposes of the plaintiff's appellate argument that the Supreme Court's 1975 opinion in Alyeska Pipeline Service Co. v. The Wilderness Society, 1975, 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed.2d 141, precludes the imposition of attorney's fees in this case. Alyeska did severely restrict the power of the judiciary to award attorney's fees to prevailing "private attorneys general." However, we are not asked to review such an award. Rather, we have before us an order made pursuant to a congressionally approved rule, reimbursing costs expended at the behest of a plaintiff who does

> not wish to continue his suit, but who faces no legal barrier to bringing the same action again at a later date. There is no doubt that a court has ample authority to award attorney's fees as a term and condition of a Rule 41(a)(2) voluntary dismissal in order to protect defendants.

580 F.2d at 129, n.9. The Fifth Circuit's decision is incorrect and in conflict with *Alyeska*.

28 U.S.C. §1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> * * *
>
> (5) Docket fees under Section 1923 of this title.

28 U.S.C. §1923 in turn provides:

> (a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> * * *
>
> $5 on discontinuance of a civil action.

In *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 (1975), this Court examined the history of these statutes and concluded that:

> [W]ith the exception of the small amounts allowed by §1923, the rule "has long been that attorney's fees are not ordinarily recoverable." [citation omitted].
>
> Other recent cases have also reaffirmed the general rule that, absent statute or enforceable contract, litigants pay their own attorney's fees.

421 U.S. at 257. *See also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974).

This Court recognized that "in certain limited circumstances," a reasonable attorney's fee to the prevailing party would be allowed. These include cases where a trustee recovers a fund for the benefit of others, where a party has acted in willful disobedience of a court order and where the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.[1] *Id.* at 257-58.

It went on to hold that:

> Congress had not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney's fees;

1 This case does not fall into any of these categories. Neither the trial court nor the appellate court found that plaintiff acted in bad faith, vexatiously, wantonly or for oppressive reasons.

> but neither has it retracted, repealed or modified the general limitations on taxable fees contained in [§1923]. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorney's fees under selected statutes granting or protecting various federal rights.

Id. at 260.

In this case, the alleged authority for the award of attorney's fees is F.R.Civ.P. 41(a). Rule 41(a) was enacted pursuant to 28 U.S.C. §2072, which provides:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts. . .
>
> Such rules shall not abridge, enlarge or modify any substantive right. . .

§2072 did not give this Court the explicit right to promulgate rules requiring the payment of attorney's fees. It specifically precluded this Court from adopting rules which enlarged substantive rights. In *Alyeska*, this

Court recognized that laws denying or granting the right to attorney's fees are substantive and not procedural in nature. Accordingly, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) requires the application of state law where the state law is not contrary to a federal statute or rule of court. 421 U.S. at 259.[2] To the extent that Rule 41(a) grants a litigant a right to attorney's fees, it enlarges the substantive rights of a litigant and is beyond the rule-making power granted to the courts.

Moreover, Rule 41(a) does not expressly authorize the award of attorney's fees. To the contrary, it merely provides that:

> [A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

There is nothing in the legislative history of the rule which shows that the framers intended this provision

2 The *Yoffe* decision places Florida litigants in a strange position. If a litigant choses to sue in state court, the state court judge cannot award attorney's fees under the state rule of civil procedure. *Campbell v. Maze*, 339 So.2d 202 (Fla. 1976). The state rule of civil procedure is in pertinent part identical to the federal rule. See Fla.Civ.P. 1.420(a) (". . . an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper"). A district judge, under an identically worded rule, can make an award of attorney's fees. It is difficult to understand how a federal rule of court which is identical to a state rule of court can be applied to reach a result directly contrary to the substantive law of the state in which the litigation is held.

to encompass awards of attorney's fees.[3] Although some circuit and district courts held that awards of attorney's fees were within the scope of the rule, the *Alyeska* decision, which almost totally precludes awards of attorney's fees without specific congressional authorization, superseded these earlier decisions and warranted a reversal of the award in this case.

The *Yoffe* decision is the first post-*Alyeska* decision to allow an award of attorney's fees after a voluntary dismissal. The decision presents an important question of federal law which should be settled by this Court. It will have a substantial chilling effect on a plaintiff's ability to take a voluntary dismissal, "which should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit." 9 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, §2364 at 165 (citing numerous cases). The conflict between the *Yoffe* decision and the *Alyeska* decision justifies the grant of certiorari to review the judgment below.

II. The Decision Below Conflicts With This Court's Decisions In *Pacific Railroad Company of Missouri v. Ketchum*, 101 U.S. 289

3 As one of the first judges to decide this issue stated:

> When the Supreme Court promulgated this rule and provided that the court might permit a dismissal without prejudice "upon such terms and conditions as the court deems proper" what sort of "terms and conditions" was contemplated? I have found nothing in the books upon which to base an answer . . .

McCann v. Bentley Stores Corp., 34 F.Supp. 234 (W.D.Mo. 1940).

(1879) And *Village of Arlington Heights v. Metropolitan Housing Development* Case, 429 U.S. 252 (1977) And Presents An Important Question Of Federal Appellate Procedure.

The Fifth Circuit dismissed this appeal. It held that a plaintiff cannot appeal the "conditions"[4] placed on a voluntary dismissal unless two requirements are met. First, plaintiff must object to the conditions imposed. The Fifth Circuit found that Yoffe "has made it quite clear that he does not acquiesce in or agree to the imposition of attorney's fees as the price of the voluntary dismissal." 580 F.2d at 130. Second, the Fifth Circuit held that the conditions imposed must amount to "legal prejudice." Although the Court declined to hold that the mere requirement to pay money could never be "legal prejudice," it held that the final judgment requiring Yoffe to pay $44,523.20 was not "legal prejudice"

4 The Fifth Circuit's opinion on rehearing shows that the judgment here was not clearly identified as a "condition of the voluntary dismissal." Yoffe asked the Fifth Circuit to vacate the judgment and enter an order that Yoffe would only be required to pay the judgment if he declined the voluntary dismissal. The Fifth Circuit refused this relief. It stated that Yoffe, faced with a final judgment, should have withdrawn his motion or sought rehearing from the trial court. It stated that the thirty month delay caused by the appeal might prevent Yoffe from having the option to proceed with trial. Although the Court did not "forbid application to the District Court to withdraw the motion and in effect to revive the Florida case," it held that the district court could now place conditions on Yoffe's right to continue with the litigation. 582 F.2d at 983-84. In effect, Yoffe will have to pay if he dismisses and pay if he obtains leave to decline the dismissal.

which entitled him to appellate review of the order. 580 F.2d at 131.

The imposition of these two threshold requirements as a prerequisite to invoking the jurisdiction of an appellate court is in conflict with this Court's decisions in *Pacific Railroad Company of Missouri v. Ketchum*, 101 U.S. 289 (1879) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Ketchum*, this Court was presented with a virtually identical jurisdictional question. Appellant attempted to appeal a consent decree. Appellees contended that the court did not have jurisdiction to entertain the appeal. This Court did not agree:

> It is contended on the part of the appellees that a consent decree in the circuit court cannot be appealed from, but we do not so understand the law. Section 692 of the Revised Statutes provided that an appeal shall be allowed from all final decrees in the circuit courts, etc. when the matter in dispute exceeds $5,000, and that this Court "Shall receive, hear and determine such appeals." This makes appeals to this court, within the prescribed limits, a matter of right, and requires us, when they are taken, to hear and decide them. If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but

> we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing. We have, therefore, jurisdiction of this appeal.

101 U.S. at 295.

As the Fifth Circuit recognized in its opinion on rehearing, the order entered by the district judge was a final judgment subject to appellate review. 582 F.2d at 983.[5] Once that determination was made, the Fifth Circuit had a duty under 28 U.S.C. §1291 and F.R.App.P. 3 to entertain Yoffe's appeal. If the Fifth Circuit found that Yoffe had consented to the judgment he was ordered to pay, it could have affirmed. However, the Fifth Circuit specifically found that Yoffe had fought the attorney's fees almost every step of the way. Having made that finding, the Fifth Circuit should have considered the merits of Yoffe's arguments concerning the amount of attorney's fees and the manner in which they were imposed.

5 The Fifth Circuit did not decide whether the final judgment awarding attorney's fees was a final order under 28 U.S.C. §1291. However, the award clearly comes within the scope of this Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). It is not a step toward final disposition of the case. It will not be merged into a final judgment. If appellant is not entitled to review now, he will never obtain it. The final judgment is reviewable under *Cohen*. *See, e.g., Preston v. United States*, 284 F.2d 514 (9th Cir. 1960) (final order relating to attorney's fees which is ancillary to main action is reviewable on appeal).

Moreover, the Fifth Circuit's requirement of showing "legal prejudice" as a prerequisite to invoking its jurisdiction is in conflict with this Court's prior definitions of standing. A litigant has standing to appeal if he simply shows that he is "injured by the challenged action of the defendant." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). Here, there is no question that Yoffe will be "injured" in a legal sense by the trial court's final judgment which requires him to pay $44,523.20 to defense counsel. The Fifth Circuit's "legal prejudice" requirement is clearly in conflict with this Court's statements that a party has standing to appeal if he shows "injury."

Moreover, the Fifth Circuit's holding is not conducive to orderly procedure in the federal courts. Litigants seeking voluntary dismissals will never know with any degree of certainty whether they have a right to appeal. Even in these inflationary times, $44,523.20 is a lot of money to lose.[6] Yet the Fifth Circuit found that the payment of $44,523.20 was not "legal pre-

6 Prior cases involving this appealability problem have never reached the extreme found here. For example, in *Scholl v. Felmont Oil Corporation*, 327 F.2d 697 (6th Cir. 1964), the Court refused to review an award of $2,820.52 in attorney's fees. Appellant had never contended that the amount was unreasonable and had agreed to the order of dismissal. Here, the award is significantly larger. Yoffe never agreed to the order and contends it is unreasonable. Moreover, in *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976), the Fifth Circuit held that appellant was entitled to appellate review of the conditions imposed on the voluntary dismissal. The Fifth Circuit conceded here: "We hesitate to leave a sum as large as that imposed on Donald Yoffe unreviewed for even a short time." However, it felt bound by its prior decision in *LeCompte* to dismiss the appeal. 580 F.2d at 130.

judice." The Fifth Circuit did not preclude future findings that the payment of some amount of money would be legal prejudice:

> We do not intend to draw the distinction between appealable and non-appealable Rule 41(a)(2) conditions on a strict line between "mere" requirements to pay money and other requirements that have res judicata consequences. There will be cases in which the amount of money set as the price of a voluntary dismissal without prejudice is so clearly unreasonable as to amount to appealable "legal prejudice" or to warrant review through a prerogative writ. We will examine each case to ensure that terms and conditions accompanying the grant of a plaintiff's Rule 41(a)(2) motion are not so outrageous as to demand a full appellate review.

580 F.2d at 131.

The result of the "legal prejudice" requirement imposed by the Fifth Circuit is that reasonable litigants have no idea whether their case involves "legal prejudice" until a panel of three circuit judges resolves the issue, as here, some 30 months after the appeal is filed. Although "appealable orders" cannot be defined with 100% precision, something more definite than the Fifth Circuit's "legal prejudice" test is required. This Court's decisions in *Ketchum* and *Village of Arlington Heights*, which allow appeals by parties injured by final decrees,

provide more precise guidelines for litigants than the Fifth Circuit's "legal prejudice" test. The conflict with *Ketchum* and *Village of Arlington Heights* justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and opinion on rehearing of the Fifth Circuit.

Respectfully submitted.

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ROBYN GREENE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of December, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to: Joseph C. Daley, Esquire, Mudge, Rose, Guthrie & Alexander, 20 Broad Street, New York, New York 10005; Aaron Podhurst, Esquire, Podhurst, Orseck & Parks, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 and to Richard E. Reckson, Esquire, Levine, Helmann & Reckson, 3501 Biscayne Boulevard, Miami, Florida 33130, Counsel for Respondents. I further certify that all parties required to be served have been served.

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_____

ROBYN GREENE

APPENDIX

Donald YOFFE,
Plaintiff-Appellant,

versus

KELLER INDUSTRIES, INC.,
a corporation and Henry A. Keller and
Norman S. Edelcup, Individuals,
Defendants-Appellees.

No. 76-2288.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1978.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, THORNBERRY and CLARK, Circuit Judges.

BROWN, Chief Judge:

Plaintiff Donald Yoffe appeals from that part of an order granting his motion for a voluntary dismissal without prejudice under F.R.Civ.P. 41(a)(2) that requires him to pay the defendants' attorneys' fees and costs as a condition of the dismissal. Yoffe attacks both the imposition and the amount of the fee award, claim-

ing that the District Court Judge exceeded his authority in granting the award and erred in determining the amount due. Specifically, Yoffe asserts that the Judge admitted hearsay evidence without a proper foundation, improperly restricted the plaintiff's right to cross-examine, and failed to take all the requisite factors into account in setting the fee award. We hold that, under a review limited to determining whether the plaintiff has suffered "legal harm," the District Court acted within its discretion in awarding the amount adjudged as the defendants' reasonable attorneys' fees and costs. On that finding, we then hold that the plaintiff is not entitled to appeal the District Court's order, and therefore dismiss the appeal.

From Pennsylvania To Florida
And Back

The plaintiff's motion for a voluntary dismissal took place against a background of complex, or at least confusing, procedural maneuvers. In 1967, Donald Yoffe and his father, Jack Yoffe, entered into a contract with Keller Industries (Keller) under which Keller would receive all the stock in two corporations owned by the Yoffes in exchange for a fixed amount of Keller stock. In 1972, the elder Yoffe filed suit against Keller in Pennsylvania state court on a cause of action arising out of this contract. In May 1974, Donald, the younger Yoffe, filed a diversity suit against Keller and two individual defendants[1] in the Federal District Court in the Southern District of Florida, alleging that the contract had been breached[2] and seeking specific performance, damages, and punitive damage against the individual defendants.[3] Discovery proceeded in the Florida case, and, at a pretrial conference held on October 17, 1974, the District Court Judge denied plaintiff's motion for further discovery and set a trial date for November. The case was delayed once and subsequently rescheduled for trial in early January of 1975.

Meanwhile, back in Pennsylvania, the father's long dormant suit began to show signs of life. In April 1974, Keller filed a petition in the Pennsylvania suit to compel the son, Donald Yoffe, to be joined as an indispensible party plaintiff. The state court issued a rule to show cause why this joinder should not be compelled and directed that all threatened and pending prosecutions be stayed. Four days after Donald filed his diversity suit in federal court in Florida, Keller petitioned the

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1 These defendants, the president and treasurer of Keller Industries, were beyond the jurisdiction of the Pennsylvania state court. Jack Yoffe did not appear as a party in the Florida litigation because he would have destroyed diversity of citizenship.

2 The complaint alleged that Keller had delayed the transfer of its stock to Yoffe because of its failure to comply with the requirements of the Securities Act of 1933 in registering the stock. Under the contract, additional stock then became due to adjust for the change in value of the stock that occurred during and as a result of the delay. Keller failed to deliver the additional stock and Yoffe sued for specific performance and damages.

3 The District Court granted the defendants' motion to strike the plaintiff's claim for punitive damages. R. at 103. Yoffe's attempt to appeal this ruling was dismissed as interlocutory. R. at 670.

Pennsylvania court for a rule to show cause why Donald was not in contempt of the state court's stay order. On October 18, 1974, the day after the pretrial conference was held in Florida, Donald Yoffe moved to be made a party plaintiff in the Pennsylvania litigation. However, Keller then withdrew its motion to compel Donald's joinder and opposed his motion to become a party plaintiff on the ground that the Florida suit was proceeding quickly. On October 31, Donald's motion to become a Pennsylvania plaintiff was granted.

On December 17, 1974, Donald Yoffe filed a motion for voluntary dismissal without prejudice in the federal district court.[4] The Judge heard Keller's arguments in opposition[5] and, by order of January 28, granted the plaintiff's motion. Pursuant to the terms of Rule 41(a)(2), the Judge ordered that "the plaintiff shall pay all costs and expenses, including reasonable attorneys' fees incurred by defendants in this case."[6] The plaintiff

4 In the alternative, Yoffe sought a dismissal as to Keller Industries but a stay as to the individual defendants, who could not be subjected to the jurisdiction of the Pennsylvania court. The District Court Judge refused to order anything less than a dismissal as to all defendants.

5 Keller's opposing papers and argument emphasized that the Florida case was scheduled for trial in a few weeks, that defendants had expended large sums of money to prepare for the trial, and that they could face another suit brought by the plaintiff on the same claim.

6 The Judge's order stated:

> Pursuant to Rule 41(a)(2), however, the court is authorized to impose, upon the granting of such a motion, conditions which protect all parties. The court notes that from the start of this action all defendants have defended vigorously and conducted extensive pre-trial discovery and preparations for their defense of the serious allegations of the complaint. The defendants have consistently pressed for a speedy determination of the issues here raised.
>
> The plaintiff has used the court to achieve his stated purpose of completing discovery for his Pennsylvania case and now, on the eve of trial, voluntarily dismiss after defendants have incurred substantial expense in defending this litigation. This cannot be condoned. The plaintiff shall pay all costs and expenses, including reasonable attorneys' fees incurred by defendants in this case. *American Cyanamid Company v. McGhee*, 5th Cir. 1963, 317 F.2d 295. [R. at 704, 706.]

appealed from this order but the Fifth Circuit dismissed the appeal, undoubtedly on the basis that an appeal prior to an order setting the amount of fees was premature.

A lengthy hearing was held to determine the amount of fees and costs the defendants had incurred in the litigation. Three law firms represented the defendants in the federal suit. Mudge, Rose, Guthrie & Alexander [Mudge, Rose] of New York had been retained to defend Keller Industries in both the Florida and Pennsylvania suits. Mudge, Rose in turn had engaged Podhurst, Orseck & Parks, of Miami, to defend Keller as local counsel, and Levine, Reckson & Reed, also of Miami, to represent the two individual defendants.[7] The claim for costs and fees for these three firms, plus miscellaneous costs, totaled approximately $134,-

7 The individual defendants had an indemnity agreement from Keller Industries, R. at 945.

789.22.[8] The District Judge heard testimony from representatives of the three law firms as to the services they performed and from two expert witnesses who opined as to the reasonableness of the fees charged. The Court also considered documentary evidence, including statements submitted to Keller by the law firms, time sheets, a computer print-out of time spent by the Mudge, Rose attorneys on behalf of Keller in the Florida suit, and a summary of Mudge, Rose's work for Keller.

At the conclusion of the hearing, the District Judge allowed attorneys' fees and costs in the total amount of $44,523.20. This sum allowed only a portion of the fees of Mudge, Rose, and granted the other fees and expenses claimed for services prior to January 1975 in full. The plaintiff appeals, challenging both the imposition of fees and costs and the amount set.

Have We An Appeal?

Our major difficulty is to determine whether the plaintiff can appeal the order granting his Rule 41(a)(2) motion on the condition that he pay $44,000 in costs and attorneys' fees. Rule 41(a)(2) provides, in pertinent part:

8 Subtracting fees and costs allocated to the hearing itself, as the trial judge later ordered, the total claimed was $122,490.95. Mudge, Rose claimed approximately $90,000; Podhurst, Orseck claimed approximately $11,000; and Levine, Helman claimed approximately $11,500.

> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The rule gives district courts the discretion to grant a motion for voluntary dismissal, a discretion designed "to allow the plaintiff to withdraw his action from the court without prejudice to future litigation." The authority to attach conditions to the order of dismissal "prevents defendants from being unfairly affected" thereby. *LeCompte v. Mr. Chip, Inc.*, 5 Cir., 1976, 528 F.2d 601; *Alvarado v. Maritime Overseas Corp.*, 5 Cir., 1976, 528 F.2d 605; *American Cyanamid Co. v. McGhee*, 5 Cir., 1973, 317 F.2d 295.[9]

9 The line of authority represented by these cases easily disposes of the plaintiff's appellate argument that the Supreme Court's 1975 opinion in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 1975, 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed.2d 141, precludes the imposition of attorneys' fees in this case. *Alyeska* did severely restrict the power of the judiciary to award attorneys' fees to prevailing "private attorneys general." However, we are not asked to review such an award. Rather, we have before us an order made pursuant to a congressionally approved rule, reimbursing costs expended at the behest of a plaintiff who does not wish to continue his suit, but who faces no legal barrier to bringing the same action again at a later date. There is no doubt that a court has ample authority to award attorneys' fees as a term and condition of a Rule 41(a)(2) voluntary dismissal in order to protect defendants.

In *LeCompte, supra,* this Court stated the usual rule governing the appealability of orders granting motions for voluntary dismissal:

> "Where the trial court allows the plaintiff to dismiss his action without prejudice, the judgment, of course, qualifies as a final judgment for purposes of appeal. Ordinarily, though plaintiff cannot appeal therefrom, since it does not qualify as an involuntary adverse judgment so far as the plaintiff is concerned." 5 Moore's Federal Practice ¶ 41.05[3], at 1068 (2d ed. 1975), *citing Scholl v. Felmont Oil Corp.*, 327 F.2d 697, 700-701 (6th Cir. 1964); *accord,* 9 Wright & Miller, *Federal Practice & Procedure: Civil* § 2376, at 247 (1971).

528 F.2d at 603; *see also Alvarado v. Maritime Overseas Corp.*, 5 Cir., 1976, 528 F.2d 605. This rule is premised on the rationale that:

> the plaintiff has acquired that which he sought, the dismissal of his action and the right to bring a later suit on the same cause of action, without adjudication of the merits. The effect of this type of dismissal is to put the plaintiff in a legal position as if he had never brought the first suit. *Maryland Casualty Co. v. Latham,* 41 F.2d 312, 313 (5th Cir. 1930); *Humphreys v. United States,* 272 F.2d 411, 412 (9th Cir. 1959).

Id. The *LeCompte* opinion points out that most cases under the Rule imposes conditions that require the payment of costs and attorneys' fees, and acknowledges that:

> [i]n one sense, any requirement imposed upon a plaintiff as a condition for allowing him a voluntary dismissal amounts to some degree of prejudice to his action, as a practical matter.

However, the opinion goes on to state that:

> generally the conditions imposed do not create prejudice in a legal sense to the bringing of another suit. Rather, the usual conditions attached to a voluntary dismissal involve prejudice only in a practical sense (*e.g.*, paying costs or expenses, producing documents, producing witnesses). The imposition of this type condition does not amount to the type of "legal prejudice" which would entitle a plaintiff to appeal the grant of the dismissal he obtains.

The question before us is whether, under the terms set for the Circuit in *LeCompte,* the District Court's $44,000 condition is the type of "legal" prejudice that would entitle the plaintiff to an appeal at this juncture.

In *LeCompte* itself, this Court did reach the merits of the plaintiff's challenge to the conditions imposed on

his voluntary dismissal. But the requirements imposed by the District Court in that case went far beyond the payment of fees and costs. The trial judge set the following conditions to the dismissal:

> (1) that any subsequent suit must be filed in the same court; (2) that plaintiff must show extraordinary circumstances to justify reopening the case; and (3) that plaintiff must make an affirmative demonstration to the court's satisfaction that a valid cause of action can be maintained against defendants.

528 F.2d at 602. This Court found that these conditions, unlike a requirement to pay a sum of money, "involve[s] prejudice in a legal sense" because the "plaintiff is severely circumscribed in his freedom to bring a later suit." *Id.*, at 604. Equally significant, the Court found that "under the circumstances of this [the *LeCompte*] case," the plaintiff could not "be deemed to have acquiesced in or accepted the terms of the order actually entered." The plaintiff had twice filed objections to the conditions that were set by the District Court. Thus, this Court was able to say that:

> The fact that plaintiff has never, in so many words, sought to have the dismissal set aside is not dispositive. The record clearly indicates he has consistently expressed his desire to be relieved from the burdens of the order and has never actually acquiesced in or accepted the terms of the dismissal.

LeCompte directs us to look at two points to determine whether a plaintiff can appeal an order granting a Rule 41(a)(2) voluntary dismissal without prejudice: (i) whether the plaintiff is "legally prejudiced" by the conditions accompanying the grant of the dismissal; and (ii) whether he agrees to or acquiesces in those conditions.[10] We hesitate to leave a sum as large as that imposed on Donald Yoffe unreviewed for even a short time. However, we believe that *LeCompte* precludes this appeal except insofar as it teaches that this Court must look at the effect of the terms and conditions set by the District Court Judge to determine whether they "legally prejudice" the plaintiff.[11]

Donald Yoffe has certainly met the second condition set by the *LeCompte* case: short of filing a formal request to set aside the order of dismissal, he has made it quite clear that he does not acquiesce in or agree to the imposition of attorneys' fees as the price of the voluntary dismissal. He appealed the Judge's order of January 28, 1975 which granted the dismissal conditioned on the payment of an as yet undetermined amount of "reasonable" costs and fees, a premature appeal that was dismissed. During the hearing held to determine the amount of allowable fees and costs, Yoffe made numerous, vociferous objections to the methods by

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10 These two points may, of course, ultimately intertwine.

11 *See also Scholl v. Felmont Oil Corp.*, 6 Cir., 1964, 327 F.2d 697, 700 where the Court held that a plaintiff could not appeal an order granting his Rule 41(a)(2) motion, but also examined the terms and conditions imposed on the dismissal and found them "not unreasonable."

which the amount of fees were proved; when the Court fixed the amount due in its order of March 1976, Yoffe brought this appeal.

However, a brief examination of the record and transcript of the hearing convinces us that Yoffe cannot meet the first part of the *LeCompte* framework: the nature of the condition set by the District Court does not amount to legal prejudice.[12]

12 Yoffe urges three points of error in the District Court's method of determining the amount of attorneys' fees: (1) the admission into evidence of computer printouts of hours billed by Mudge, Rose without sufficient foundation; (2) the limitation of his cross-examination of a Mudge, Rose attorney as to whether the work performed and billed for the Florida case could also be used in the still-pending Pennsylvania suit; and (3) the failure of the District Court to follow *Johnson v. Georgia Highway Express, Inc.*, 5 Cir., 1974, 488 F.2d 714, and "detail" specifically the factors on which it based its fee award.

We specifically decline to reach the merits of these claims, and hold only that neither the award nor the method by which it was determined is so clearly unreasonable as to constitute legal prejudice. In order to reach this conclusion, however, we necessarily have had to engage in a limited review of Yoffe's claims and in that preliminary inquiry we have been guided, with respect to each claim, by the following considerations. (1) The District Court has wide discretion in determining the reliability of documentary evidence. *United States v. Jones*, 5 Cir., 1977, 554 F.2d 251, 252. (2) The cross-examination of the Mudge, Rose attorney seemed clearly to cross the line between the issue of attorneys' fees and the legal theories, defenses, and strategies involved in the Pennsylvania and Florida cases. The thought processes relevant to pending litigation must be protected from disclosure. *Hickman v. Taylor*, 1947, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451; 8 Wright & Miller, *supra*, § 2026, at 320-32. (3) *Johnson* is distinguishable. Its requirement to "detail" attorneys' fees awards applied to a statutorily authorized award of fees, *Matter of Colonial Corp.*, 5 Cir., 1977, 544 F.2d 1291, 1299. The inclusion of fees as a condition for a voluntary dismissal without prejudice under Rule 41(a)(2) is a different kind of beast which has not yet been saddled with mandatory *Johnson*-type requirements.

We do not intend to draw the distinction between appealable and non-appealable Rule 41(a)(2) conditions on a strict line between "mere" requirements to pay money and other requirements that have res judicata consequences. There will be cases in which the amount of money set as the price of a voluntary dismissal without prejudice is so clearly unreasonable as to amount to appealable "legal prejudice" or to warrant review through a prerogative writ. We will examine each case to ensure that the terms and conditions accompanying the grant of a plaintiff's Rule 41(a)(2) motion are not so outrageous as to demand a full appellate review. However, neither the amount of fees and costs set in this case as a condition on Yoffe's voluntary dismissal, nor the method by which they were determined, was so patently unreasonable as to warrant any extraordinary action on our part. We therefore hold that Yoffe cannot bring this appeal and dismiss.[13]

APPEAL DISMISSED.

13 If a plaintiff in Yoffe's position accepts the dismissal with its conditions, the defendants have an enforceable judgment which they can execute. However, the plaintiff has two options if he views the money judgment as too high a price to pay for a voluntary dismissal without prejudice. First, he can decline to dismiss, decline to pay, and take his chances on a trial. See *Scholl v. Felmont Oil Corp.*, 6 Cir., 1964, 327 F.2d 697, 700; *Scam Instrument Corp. v. Control Data Corp.*, 7 Cir., 1972, 458 F.2d 885; see generally, 9 Wright & Miller, *supra*, § 2366, at 183; 5 Moore's, *supra*, ¶ 41.05, at 41-90. Alternatively, the plaintiff can accept the dismissal and decline to pay. In such a situation, at least two circuits have held that the District Court may then dismiss the action with prejudice. See *DeFilippis v. Chrysler Sales Corp.*, 2 Cir., 1940, 116 F.2d 375; *Stern v. Inter-Mountain Tel. Co.*, 6 Cir., 1955, 226 F.2d 409. Of course a dismissal with prejudice goes to the merits of a case and is clearly an order that a dissatisfied plaintiff can appeal as of right. See *Durham v. Florida East Coast Ry. Co.*, 5 Cir., 1967, 385 F.2d 366, cited in *LeCompte*, *supra*, at 603.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1978

No. 76-2288

D.C. Docket No. 74-628-CIV-JLK

DONALD YOFFE,
Plaintiff-Appellant,

versus

KELLER INDUSTRIES, INC., a Corporation, and HENRY A. KELLER and NORMAN S. EDELCUP, individuals,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, THORNBERRY and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby dismissed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 13, 1978

Issued As Mandate:

Donald YOFFE,
Plaintiff-Appellant,

versus

KELLER INDUSTRIES, INC.,
Defendants-Appellees.

No. 76-2288.

United States Court of Appeals,
Fifth Circuit.

Oct. 27, 1978.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM:

Donald Yoffe attempted to appeal an order granting his motion for a voluntary dismissal without prejudice under F.R.Civ.P. 41(a)(2) on the condition that he pay defendants over $44,000 in costs, expenses, and reasonable attorneys' fees. The Court dismissed the appeal, 580 F.2d 126 (1978), holding under the authority of *LeCompte v. Mr. Chip, Inc.*, 5 Cir., 1976, 528 F.2d 601, that the condition set by the District Court was not so unreasonable as to constitute legal prejudice and that Yoffe therefore could not appeal the dismissal order.

We made clear that a plaintiff in Yoffe's position has several options. See 580 F.2d at 131 n. 13. He can of course accept the dismissal with its conditions, in which case the defendants have an enforceable judgment which they can execute. If, however, the plaintiff feels the conditions are too high a price for voluntary dismissal without prejudice, he can either (a) "decline to dismiss, decline to pay, and take his chances on a trial," *id.*, or (b) "accept the dismissal and decline to pay," *id.*, in which case the District Court may then dismiss the action with prejudice and, if it does, the plaintiff may

appeal the dismissal since it operates as a determination of the merits.

Yoffe now contends that option (a) is not available to him because, he claims, the District Court entered a "final judgment" ordering him to pay $44,000 to the defendants. Yoffe has therefore filed a petition for rehearing requesting this panel to vacate the "final judgment" and direct the District Court to give him the option of refusing to pay the $44,000 and continuing with the case. In effect, Yoffe is insisting that under this Court's formulation of the options that were available to him in the District Court, he is entitled as of right to withdraw his motion for voluntary dismissal.

This argument ignores several things. First is the fact that Yoffe alone is responsible for whatever predicament he finds himself in. It was he who filed this federal suit in Florida and then, after having joined as a party plaintiff a related state suit in Pennsylvania against the same defendants and after having obtained the benefits of discovery in the federal courts, moved to dismiss the federal suit without prejudice on the eve of trial. And, after the District Court imposed conditions upon such a dismissal in order to compensate the defendants for the expenses incurred in the soon-to-be abandoned federal litigation, it was Yoffe who then failed either to withdraw his motion for voluntary dismissal or to seek reconsideration of the conditions placed upon that dismissal,[1] but rather treated the District

1 Yoffe could, for example, have moved the District Court to amend or alter its judgment under either Rule 52(b) or Rule 59(e).

Court's order as one subject to review and took a futile appeal to this Court. Second, and more significant, is the fact that in the 30 months since entry of that order much water has gone over the dam. There is the distinct possibility, which we are in no position to evaluate, that circumstances have changed so as to affect adversely the ability of the Florida defendants to now litigate the case on its merits if it is resuscitated by this belated demand that all the clocks be turned back to the time the move to dismiss voluntarily was misguidedly initiated. To this must be added costs, expenses, and counsel fees incurred in the hearing on the conditions to be fixed[2] and in the abortive from that order.

Our opinion does not forbid application to the District Court to withdraw the motion and in effect to revive the Florida case. But all must recognize that the District Court has power to impose reasonable conditions on this extraordinary relief. Certainly it need not ignore the fact that Yoffe, as a consequence of his motion to dismiss, has subjected the defendants to the additional expenses of an evidentiary hearing and an improper appeal to this Court. The rationale for con-

2 When Yoffe first moved for a Rule 41(a)(2) dismissal on the eve of trial, the District Court granted the motion but ordered an evidentiary hearing for the purpose of considering and fixing the costs, expenses, and attorneys' fees the defendants had incurred in defending the case up to the motion to dismiss voluntarily. When, after that evidentiary hearing, the District Court determined that those expenses and fees totaled $44,000, it did not include any costs, expenses, or attorneys' fees incurred in connection with the hearing itself.

ditioning a voluntary dismissal without prejudice upon payment of defendants' costs and expenses is to "prevent defendants from being unfairly affected by such dismissal." *LeCompte, supra,* 528 F.2d at 604. The same rationale supports the authority of the District Court to impose conditions upon the continuance of a suit in which the plaintiff has moved for a voluntary dismissal under Rule 41(a)(2) and, after having forced the defendant to incur substantial expenses in connection with that motion, has elected not to accept the dismissal because the price is too high.

The petition for rehearing of this appeal is hereby DENIED.